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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-7

MARY ALICE FIRESTONE,
Petitioner,

v.

TIME, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TIME, INC.,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit which on April 20, 1972, reversed a judgment recovered by petitioner in the District Court based on a claim of defamation in an article appearing in the May 20, 1966, issue of Life Magazine. On June 22, 1972, the Court of Appeals for the Fifth Circuit entered an order clarifying and amending its judgment and decree by substituting the phrase "REVERSED AND SUIT DISMISSED" for the phrase "REVERSED". A copy of that order is annexed hereto as Appendix A.

OPINIONS BELOW

The April 20, 1972 opinions of the Court of Appeals (two of which were concurring opinions) are not as yet

reported. They are annexed to the petition as Exhibit A. The opinion of the District Court appears at pp. 924-938 of the appendix below (hereinafter designated as A).

QUESTIONS PRESENTED

Three questions have been presented concerning recent First Amendment cases dealing with constitutional protection in connection with defamation and privacy. First, when does the mantle of constitutional protection fall? Second, if it does offer protection, precisely what is that protection? Third, by what means can the publisher avail himself of that protection?

The opinions in the Court of Appeals resolve those questions in this case in accordance with the applicable decisions of this Court, leaving nothing warranting the further attention of this Court.

STATEMENT

Mrs. Firestone, plaintiff and petitioner, is a former beauty queen, third wife of Palm Beach society millionaire Russell Firestone (heir to the Firestone tire fortune) and party to one of the most publicized divorce suits of the decade.[1] She filed suit for separate maintenance and custody of their child in November 1964. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery, and eventually prevailed, although plaintiff was granted custody of the child. In January 1966, during the pendency of the divorce action, it was reported that a court order had forbidden "surveillance by private detectives and

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[1]The intense public interest in that action is set forth in the opinion of the Florida District Court of Appeals in *Time Inc.* v. *Firestone*, 254 So. 2d 386 (1971), another action filed by this same plaintiff against petitioner based on a Time Magazine article which appeared in 1967. That action, also, has been dismissed on constitutional grounds. A petition for certiorari in the Supreme Court of Florida is presently pending unresolved.

wiretapping telephones or any other such tactics" by either party (A. 747-748). On April 6, 1966, the same order was again reported in connection with a $100,000 suit filed by Mrs. Firestone against a private detective for "openly shadowing her."

Meanwhile, wiretapping and eavesdropping—made possible on an ever greater scale by the increased sophistication of available equipment—had become a matter of great public interest and concern across the nation. The questions raised by the increasing frequency of use and great potential for destruction of privacy had led to widespread public debate and to then pending hearings on the matter before the United States Senate. In the spring of 1966, Life Magazine began work on an article on the subject.

The article, entitled "Snooping Electronic Invasion of Privacy", appeared in the May 20, 1966, issue of Life Magazine.[2] It comprised ten pages of photographs and text, including a description of the sophisticated equipment available for electronic eavesdropping and the techniques and occasions for its use. Noting that "the technology of snooping has so outdistanced the law that controls are all but nonexistent", Life called for increased public concern over the burgeoning threat to individual privacy.

Life pointed out that although the use of electronic snooping devices by government investigators is widespread, it is by no means the only, or even the primary, cause for concern:

> Federal agency and police operatives at least can argue that wiretapping and bugging are helpful aids in the enforcement of the law. But that justification does not exist for the growing legions of private citizens—busi-

[2]Since the article (defendant's Exhibit 1) does not lend itself to reproduction in the Appendix, extra copies are being served with this brief for the convenience of the Court.

> nessmen, union officials, employers, suspicious spouses —who find it ridiculously easy to indulge in electronic spying.

Several examples of the use of such tactics by private citizens were cited. Among them was the example of Jack Harwood of Palm Beach, who made a handsome living by providing private individuals with snooping services during their divorce proceedings. As an example of Harwood's services, Life cited his role in the Firestone divorce proceeding (which had been in the news for months) and the mutual spying which Life's investigation showed had taken place in that case.

Mrs. Firestone agreed expressly to be interviewed by Life's stringer Chandler because "she would like a story done" (A. 757-758). She knew that the proposed article dealt with electronic snooping (A. 758). With her permission, and over a two-day period, over 100 photographs were taken of her (A. 668, 675, 678, 679).

The District Court refused to give constitutional protection to the article and found for plaintiff. The Court of Appeals found that the constitution applied to it and reversed.

ARGUMENT

(a) This case does not warrant review

If this petition had been filed nine years ago, there would have been ample justification for this Court to review the case. We submit, however, that the result below was correct and in keeping with the applicable decisions of this Court beginning with *New York Times* v. *Sullivan*, 376 U. S. 254 (1964). There is no conflict of decisions and this case does not involve any important question which should be decided here. Instead, the issues dispositive of this case

have been substantially determined by this Court and there is nothing in this case warranting its further attention.

While the questions posed by petitioner are interesting, if correctly phrased, they are not presented in this case. The public interest in the Life article in question and plaintiff's legitimate connection therewith are clear and were found unanimously by all three members of the Court below. There was no proof of falsity whatsoever by plaintiff so that, whether such proof need be made by a preponderance of the evidence or with convincing clarity, is immaterial. Finally, while we believe Judge Ainsworth was correct in his application of the *de novo* review doctrine as enunciated by this Court, Judges Bell and Godbold found for respondent without use of that doctrine and, as pointed out by Judge Bell at the conclusion of his concurring opinion (petitioner's Appendix A, p. 24), Judge Ainsworth did not need the *de novo* review doctrine for the result which he reached in the case.

In essence, plaintiff is relying upon application of a negligence standard, disregarding that negligence is plainly not the test under the Constitution, as clearly enunciated by this Court in *New York Times* v. *Sullivan*, 376 U. S. 254, 288 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64, 79 (1964); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727, 731-732 (1968) and *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 50-51 (1971).

(b) Public interest

The publication in this case clearly dealt with a matter of public interest. Wiretapping and eavesdropping and particularly their employment by private citizens, have been matters of considerable public concern for years.

Indeed, the article in this case was triggered by an investigation which was being conducted by a Senate committee into the use and misuse of such devices.[3]

Moreover plaintiff, who had commanded a substantial amount of independent public interest prior to this publication, voluntarily thrust herself into a matter of important public interest by consenting to have a story done about her. No one compelled her to give those interviews. She voluntarily and willingly participated because "she would like a story done . . ." (A. 758). And, as she herself readily and repeatedly admits, she was well aware that the subject of the proposed publication was electronic snooping (A. 173, 174, 176, 178, 188, 191).

Any attempt to avoid the effect of First Amendment cases by asserting that, although the publication as a whole concerned a matter of legitimate public interest, the particular reference to plaintiff did not is simply untenable. The whole point of the article, and the matter of public interest, was that private citizens have access to the means of snooping for their own ends in far too many cases. A well publicized example of that was the "two-way snoop" engaged in by the Firestones. To hold that the use of these devices by private citizens is a matter of public interest, but a particular private citizen's use of them is not, is to establish a rule that would make it virtually impossible to report on any matter of vital public concern, since the publisher

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[3]The continuing national concern with electronic surveillance was again evidenced at the American Bar Association's recent mid-year meeting where, after extended debate, the ABA House of Delegates adopted Standards Relating to Electronic Surveillance. A.B.A.J., Vol. 57, April 1971, pp. 356-358; American Bar News, Vol. 16, No. 3, March 1971, p. 1. See also *United States* v. *United States District Court for the Eastern District of Michigan, Southern Divison, et al.*, U. S. #70-153, decided June 19, 1972.

would be reduced to making abstract assertions completely devoid of concrete examples.[4] Such writing would not be reporting at all, but merely theorizing.

Plaintiff in this case is, of course, a "public figure" in any event. As the wife of the heir to the Firestone tire fortune she had world-wide notoriety. And, when she instituted what developed into one of the most sensational and publicized divorce cases of the decade, public attention was riveted on her. Even aside from her fame stemming as a Firestone and the publicity she was receiving as a result of the divorce, she clearly became a fair subject of public comment to the extent that she indulged in the practices with which the Life article was concerned. When a person does things which are "illustrative" of matters of public interest, that person cannot claim the status of a private citizen with regard to reports of those activities.

The fact that the person who is engaging in such activities may attempt unsuccessfully to screen those activities from public view is likewise irrelevant. Thus, the activities of a foreign spy ring or criminal syndicate theretofore entirely unknown would be a subject of constitutionally protected expression, notwithstanding the strong preference on the part of the individuals involved that those activities remain unpublicized. Here, it is undisputed that Mrs. Firestone employed private detectives. Indeed, at one time, she

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[4]Compare the concurring opinion of Mr. Justice White in *Rosenbloom* v. *Metromedia*, 403 U. S. at p. 61.

The District Court in rejecting Constitutional protection because the reference to plaintiff "could have been deleted entirely" (para. 10) obviously relied on the District Court opinion in *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005 (M.D. Fla. 1969), ignoring that the rationale of the District Court had been rejected in the opinion of the Court on appeal in that case (427 F. 2d 219) as it was later by this Court in *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971). It is also significant that plaintiff's counsel at final argument relied heavily on the Seventh Circuit opinion in *Pape*, which was destined for an 8-1 reversal at the hands of this Court (A. 868, 918).

was even enjoined by the court from using surveillance tactics against her husband. At the very least she was a legitimate subject of comment.

It is clear that the essence of the protection afforded publishers by the First Amendment lies in the public interest test and that plaintiff's activities, as an illustration of a matter of public interest, come within that protection. Moreover, it is clear that Mrs. Firestone is a public figure. The cloak of constitutional protection is available to this publication. Unless plaintiff can show "actual malice", the publisher must prevail.

In short, this case is far removed from a purely private libel of a person who has not taken part in any public controversy or who has lived an obscure private life. The result below is fully in keeping with the holdings of this Court, beginning with *New York Times* and, in particular, *Curtis Publishing Company* v. *Butts,* 388 U. S. 130 (1967) and *Rosenbloom* v. *Metromedia,* 403 U. S. 29 (1971). This case does not present any new or novel question not previously considered by this Court, and it certainly is not an appropriate vehicle for considering what constitutional standards may govern the adjudication of purely private actions.

(c) Proof of falsity with convincing clarity

This problem is just not presented by this case. Judges Ainsworth and Godbold did not touch upon it in their opinions, since they found that there was no proof with convincing clarity of knowledge of falsity (*New York Times*) or serious doubts as to truth (*St. Amant*) (as is clear from the record). While we believe that Judge Bell applied the correct test that falsity must be proved with convincing clarity, as set forth by this Court in *Garrison,* supra at 74, that application is, in reality, immaterial, since not only was there neither proof of falsity with convincing clarity nor

proof of falsity by a preponderance of evidence, there was no proof of falsity at all.

We think these points are clear from a mere reading of the opinions below. However, as an aid to the Court, we annex hereto, as Appendix B, extracts from our main brief below and, as Appendix C, extracts from our reply brief below in which we set forth with more detail and precision the nature of the proof presented at trial with respect to falsity, knowledge of falsity and serious doubts as to truth.

(d) De novo review

As stated above, this question, again, is not presented for review in this case since neither Judge Bell nor Judge Godbold utilized that device and, while Judge Ainsworth did, it was not necessary to his decision. However, we think that the discussion of *de novo* review by Judge Ainsworth is clearly correct and follows the explicit directives of this Court for an independent review of the evidence as stated in *New York Times, supra* at p. 285; *Time, Inc.* v. *Pape,* 401 U. S. 279, 284 (1971); *Rosenbloom* v. *Metromedia, supra* at pp. 53-54; *Time, Inc.* v. *Hill, supra* at 391 et seq.; *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 156 *et seq.* (1967); *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 83 *et seq.* (1967); *St. Amant, supra* at 370 *et seq.* and *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U. S. 6, 11 *et seq.* (1970). As the opinions in the Court below state, the principles of these cases preclude recovery by petitioner regardless of what label is used to describe the review process.

CONCLUSION

The petition does not present any questions warranting review by the Court and should be denied.

July 12, 1972

Respectfully submitted,

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APPENDIX A

Order of the United States Court of Appeals for the Fifth Circuit Filed June 22, 1972

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1887

MARY ALICE FIRESTONE,

Plaintiff-Appellee-Cross Appellant,

VERSUS

TIME, INC.,

Defendant-Appellant-Cross Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion filed by Defendant-Appellant-Cross Appellee Time, Inc., for clarification of the Court's decree and mandate in the above cause is hereby GRANTED; our holding that the judgment appealed from is "REVERSED" necessarily carries with it dismissal of plaintiff's suit, a new trial not being contemplated by our decision. Our judgment and decree will be accordingly amended to show our disposition of this case as "REVERSED AND SUIT DISMISSED."

APPENDIX B

2. Preparatory investigation for publication.

Plaintiff was involved in only one-half of a page of the ten page article. The information for that part of the article was supplied by David Chandler, an independent reporter hired by Life for this assignment, and Charles Rapoport, a freelance photographer, also hired by Life for this assignment.[5] Chandler had been assigned by Editor Richard Billings to cover the Southern United States in connection with the wiretapping and eavesdropping story which was being prepared (A. 241, 244). While working in Miami, Chandler read an article in the Miami Herald which reported that a judge in Palm Beach has issued an order restraining Mr. and Mrs. Firestone from using surveillance tactics on each other in their divorce litigation (A. 654, 748).

Chandler and Rapoport traveled to Palm Beach, where Chandler learned that private detective Jack Harwood was working for Russell Firestone in connection with the divorce (A. 654, 748). He interviewed Harwood at length, and was told several stories about Harwood's snooping activities in general and his efforts on behalf of Russell Firestone in particular. (A. 748, 749, 752, 753). Rapoport also took several pictures of Harwood with his various types of "bugging" equipment. (A. 659).

In that interview, Harwood related that during the Firestone divorce, an assistant identified as Carl Geisler had *sold him out* and went over *to work* in Mrs. Firestone's behalf. He told of a raid which Geisler had set up, supposedly to catch Mrs. Firestone in compromising circumstances but which had backfired when Mrs. Firestone turned out to be in an innocent situation. He stated that

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[5]Chandler and Rapoport were not Life employees but were independent contractors, retained and paid on an hourly basis for specific assignments. (A. 697, 741, 831). They were paid on a time basis. (A. 831) received no fringe benefits and paid their own taxes. (A. 697, 741).

it was on this occasion that he knew Geisler had *sold him out*, using those precise words. (A. 76, 754).

Chandler then sought to interview both Mr. and Mrs. Firestone but was able to reach only Mrs. Firestone. She agreed to meet him and Rapoport at the home of a friend, Lily Pulitzer, because "she would like a story done". (A. 757, 758). There, Mrs. Firestone asked that her attorney, Joseph D. Farish, Jr., be allowed to review the notes of her interview, to which Chandler agreed. (A. 758). She also requested that she be interviewed at her home and an appointment was made for the following day.

When Chandler and Rapoport arrived at Mrs. Firestone's home the next day they were met by Carl Geisler who was then working for the plaintiff. (A. 661, 684, 759, 764, 769). Geisler asked Chandler and Rapoport for identification, and they produced their press cards. (A. 661, 760). Geisler asked them for the name of a person at Life with whom he could check and they gave him Billings' name. (A. 761). After a telephone call to Billings, Geisler was satisfied with their credentials. (A. 661, 662, 761, 762).[8]

Chandler's interviews of the plaintiff concerned the use of wiretapping and surveillance against her by her husband. (A. 173, 174, 176, 178, 181, 191, 758, 759). On the first day, the plaintiff related several incidents of surveillance against her by her husband, both before and during the divorce proceedings. (A. 762-764, 769, 775). One incident concerned the raid on her house which Harwood had described to Chandler, and in which Geisler had participated. (A. 764, 769). Geisler stated that at that time he had decided to change sides, because he was so appalled by the incident. (A. 764, 769). They also related the subsequent seizure of Mr. and Mrs. Firestone's son by Mr. Firestone and Geisler stated that it was at this time he made his open break with Harwood. (A. 769). They also told Chandler

[8]Billings confirmed that he received such a telephone call. (A. 247).

of the subsequent occasion on which Geisler and Mrs. Firestone's brother, Charles Turner, had caught a private detective named Balletti changing batteries in some eavesdropping equipment which had been installed in Mrs. Firestone's garage. (A. 771-772).

Rapoport had considerable photographic equipment with him (A. 660) and Mrs. Firestone and Geisler took Chandler and Rapoport on a tour of the house to look for good photographic backgrounds. However, no photographs were taken then since Mrs. Firestone requested that they wait until the following day because she did not look her best. (A. 662). Geisler requested that he not be photographed at all. (A. 762, 821). Both these requests were complied with, except for two photographs taken the following day in which Geisler inadvertently appears. (A. 678, 679, 760, 821).

Chandler and Rapoport returned the next day for photographs (A. 662, 776). Again, Geisler was present (A. 664, 776). They all left the house, with Geisler, Rapoport and Chandler in Chandler's car, following Mrs. Firestone who used her car to take her son to school and drive back home. Rapoport took several pictures during this trip. (A. 663, 776). Later the same day, Mrs. Firestone made a trip to the grocery store and to pick up her son and other children at school. Again, Rapoport followed and took photographs. (A. 664, 778, 779). Other photographs were taken at the Firestone's home, showing Mrs. Firestone reading and playing with her son. (A. 663, 667, 776). Some are full-faced close-ups of Mrs. Firestone looking directly into the camera. (A. 669). She requested that he photograph her left side, which she considered the more flattering and he attempted to comply. (A. 670, 674). The distance of the camera from Mrs. Firestone in these photographs varied from 3 to 20 feet, and she was always aware that she was being photographed. (A. 664, 666, 669, 672, 674). Well over 100 photographs were taken during the

course of the day, of which Chandler appears in one and Geisler in two. (A. 668, 675, 678, 679).

Later that afternoon, pursuant to Chandler's agreement to clear his notes of his interviews with her attorney, Geisler and Mrs. Firestone came by the motel where Rapoport, Chandler and Chandler's wife were staying and picked up Mr. and Mrs. Chandler to go to Farish's office. (A. 699-702, 780-782). They proceeded to Farish's office, where Chandler read the notes of his interviews with Mrs. Firestone and Farish responded that they sounded all right to him. (A. 703, 793, 794).

Throughout the two days of interviews and photographs, Geisler was present. He was representing Mrs. Firestone's interests as a bodyguard and private detective and both he and Mrs. Firestone made direct statements to that effect (A. 684, 685, 759, 760), in addition to the specific incidents which they related to Chandler of his past efforts on her behalf, some while he was still employed by Harwood. (A. 769, 771-773).

B. Life's Editorial Process—the writing of and basis for, the caption.

Based on his investigation in Palm Beach, Chandler composed a dispatch which he sent to Life on April 30, 1966, the entire text of which was read at trial. (A. 65-81). Included in that dispatch were the statements:

> [Mary Alice] wooed one of Harwood's top investigators, Carl Geisler, *to work in her interests.*
>
> * * *
>
> Harwood verifies this story [abortive raid on Mary Alice's home] and says it is on this occasion that he first knew Carl Geisler had *sold him out* to Mary Alice. His story: "I had left Geisler to watch the house. It was Russell's house and we had permission to enter. Geisler radioes me that Mary Alice and some other guy have

gone into the house and it's time to make the bust. We get to the house and Geisler points out the room he says Mary Alice and the guy are drinking in; we bust in the door. There's Mary Alice alone with the baby and nurse. We look through the house. Nobody else. We bust right back out." [Emphasis added].

To Chandler the term sell out meant only that Geisler had betrayed the interest of his original employer. (A. 803, 819).[7] It did not mean either perjury or bribery. (A. 799). The term sell out came from what Geisler and Harwood had both told him and from the whole circumstances which he had learned. (A. 764-770, 816). Other witnesses in the case testified that to them sell out meant "that Mary Alice was buying one of Jack's assistants . . ." (A. 308); that one is "enticed to come away" by a competitor (A. 329); "to take someone else's detective" (A. 331); and would apply to priests changing religions. (A. 349).

The dispatch was received in New York by Richard Billings, Life Senior Editor, who had overall responsibility for preparation of the entire eavesdropping story. (A. 238, 241, 253). Relying on the information contained in the Chandler dispatch, Billings wrote the caption of which complaint is made in this case. (A. 253, 254, 256). Researcher Alan Patureau read the final version of the caption to Chandler over the telephone and confirmed with him that it was completely true and accurate. (A. 91). Both Billings and Patureau relied entirely on Chandler's report of his investigation. (A. 92, 256, 257, 263). Thus, Billings testified at trial as follows:

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[7]The examples used by Chandler to explain the term "sell out" were the recent accusations by the members of the postal unions that the union president had sold out in settling the strike and the accusations by the Allies in 1940 that the Soviet Union had sold out in signing the non-aggression pact with Germany. (A. 819). In neither case was perjury or bribery involved.

Q. You wrote this article? A. That is correct.

Q. Tell us where you got this information from, from which it is based? A. I got it entirely from this file received from David Chandler. (A. 256)

* * *

The Court: Where did you get this "sellout." That is the critical point of this lawsuit.

By Mr. Frates: Where did you get that information from?

A. I got it from Chandler's file.

The Court: Purely from his file, no other information?

The Witness: The answer to that question is "Yes, purely from his file," no other information. (A. 257).

* * *

The Witness: I have investigated this file very carefully.

The Court: But did you find any factual situation that indicated to you Mary Alice had purchased——

The Witness: Had wooed him? Well, I went only from the—what any connotation that you can take from the word "wooed." The fact that I was concerned with was not how she had lured him away. It was the fact that she had lured him away.

The Court: And you did not know she had. You only took his word, Chandler's word.

The Witness: Yes, that is correct. I took Chandler's word. Chandler was the source of this, right. (A. 263).

Specifically, Billings relied on certain factual statements contained in Chandler's dispatch to support the phrase *"sellout and work"*. He identified those portions of the dispatch as follows:

> . . . she wooed one of Harwood's top investigators, Carl Geisler, to work in her interests. Geisler and Mary Alice's brother, Charles Turner, combined as her and her 3-year-old child, Mark's, bodyguard. (A. 279).
>
> . . . Harwood verifies this story . . . It is on this occasion that he first knew that Carl Geisler had *sold him* out to Mary Alice. (A. 280). [Emphasis added].

Billings also relied on the portion of the dispatch which related the story, told by Geisler himself, of the occasion on which he and Turner had apprehended Balletti in Mrs. Firestone's garage. (A. 78, 79, 287).

Billings testified that he believed the caption to be true at the time he wrote it and still believes it to be true today. (A. 260, 265).[8]

Chandler, in turn, testified that all the information contained in the dispatch was accurate and that he believed the caption as published was true and so told Billings and Patureau prior to publication. He described the basis for his belief as follows:

> First, there is Mr. Harwood's statement that Geisler had sold him out, because of Mary Alice describing the incident of the sellout becoming manifest to him at the time of the raid, which he felt Geisler had set him up for and embarrassed him with this raid. He said that after the raid he started slowly phasing Carl Geisler out of the picture, but Carl Geisler still had access to his files. He said that he had received telephone calls that while

[8]All of the witnesses to Life's editorial process were completely consistent in their testimony even though none was still an employee of Time, Inc. at the time of trial. Billings had left some three years before the trial and Patureau, having been previously fired by Life, was clearly a hostile witness. Chandler was merely a contract writer or "stringer." And, Rapoport was, but is no longer, a free-lance photographer who did occasional work for Life magazine.

Geisler was in his employ, Geisler was meeting with Mary Alice and another attorney.

Then the next person I talked to on the subject was Mary Alice at the Pulitzer house, and she said she had a detective working for her, and she said we would meet him the next day, and we go to her house and the fellow that opens the door is the same Carl Geisler, and he starts telling us stories, first, that he is now a detective for Mary Alice, that he did work for Harwood, that at the same instance that Harwood said that Geisler's attitude became manifest, the night of the raid.

Geisler confirms this, and says that is the night that he switched sides, although he continued to work (A. 797).

* * *

. . . for Harwood, although his alligiance has switched to Mary Alice. (A. 798).

* * *

. . . and he says that the incident that caused him to make the open break with Harwood was the incident of the baby seizure. (A. 799).

* * *

. . . and this again dovetails exactly what Harwood says that Geisler switched sides, switched allegiance earlier; continued to work for Harwood and then openly made a break. (A. 799).

* * *

Also, as I say, it was manifest to me that Carl Geisler and Mary Alice were on very close personal terms, and then throughout the remainder of my meetings and Rapoport's meetings with Mary Alice, Geisler is there; he is functioning as her private detective . . . (A. 801).

* * *

The whole thing is whether you continue to work for his man that you changed sides from which Geisler

said he did. He worked for him at the raid, and he changed sides, but he did not quit. He did not make his open break until later. (A. 801).

* * *

. . . I do believe to this day that Geisler betrayed Harwood at a certain point, because when he mentally quit Harwood he did not tell Harwood he was quitting. When he mentally threw his sympathies and his work to Mary Alice, he did not tell Harwood that. He went ahead and continued to work for Harwood. (A. 803).

Thus, the publication was completely consistent with what Chandler had learned and reported in his investigation and it did not mean "inciting to commit perjury."

C. Damages claimed.

The plaintiff claimed that this publication injured her in her marital litigation. However, Judge James Knott, the trial judge, testified that the publication did not influence him in any way and made no difference in his evaluation of the testimony presented in that case. (A. 587, 598).

The plaintiff also testified that she had difficulty getting witnesses to testify in her marital litigation and she didn't want to subpoena them because she was "trying for custody". (A. 186). But there was no evidence that anyone refused to testify much less what relevant, noncumulative evidence could have been added. In fact many witnesses did testify in her behalf. (A. 187). And, even the plaintiff's friend, Donna Smith, who was "hesitant" stated that if subpoenaed she would have testified and would have told the truth. (A. 302). Moreover, the plaintiff was awarded custody so this entire claim is moot.

The plaintiff also claimed that this publication caused her great mental anguish. But she presented no medical evidence at all in support of that claim. However, the defendant did establish that plaintiff had been seeing a psychiatrist, both before and after the publication. He testified that she made no complaints to him about the publication, (A. 574, 577), and that she had substantially recovered from her psychiatric problems. (A. 581, 837). Finally, there was no evidence whatsoever that this publication ever subjected the plaintiff to distrust, contempt, ridicule or humiliation in the community, as she had claimed in her complaint. (A. 4).

B. The record shows, as a matter of law, that plaintiff failed to establish that the caption was false and was published with knowledge of falsity or serious doubts as to truth.

1. The standard

A plaintiff in a libel action to which the constitutional protection applies must prove "actual malice" with "convincing clarity". "Actual malice" means publication of a false matter "with knowledge that it was false or with reckless disregard of whether it was false or not", *New York Times vs. Sullivan, supra,* at 280. It is for the courts to determine whether this standard has been met—they must examine the statements in issue and the circumstances under which they were made to see whether the proof presented to show "actual malice" has "the convincing clarity which the constitutional standard demands." *New York Times vs. Sullivan, Id.* at 285-86. As the court stated in the recent case of *Time, Inc. vs. Pape,* 401 U. S. 279, 91 S. Ct. 633, (February 24, 1971), "in cases involving the area of tension between the first and fourteenth amendments on the one hand and state defamation laws

on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff".

These principles—enunciated in *New York Times* and repeated in *Garrison vs. Louisiana,* 379 U. S. 64, 74 (1964), have remained constant as the Supreme Court has extended the doctrine of *New York Times* to articles involving public figures and matters of public interest. In *St. Amant vs. Thompson,* 390 U. S. 727 (1968), the Court explained that in cases concerning publications dealing with public figures and matters of public interest, as well as public officials, a plaintiff has the burden of showing that the publication is made with "actual malice" as defined in *New York Times* and later cases. The Court went on to explain what its cases mean with respect to the "reckless disregard" branch of its "actual malice" rule:

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrated actual malice. 390 U. S. at 731.

And the Court went on to emphasize that nothing less would "adequately implement first amendment policies," stating:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of the probable falsity. Concededly the reckless disregard standard may permit re-

> covery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of other public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement first amendment policies. Neither lies nor false communications serve the ends of the first amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the first amendment protect some erroneous publications as well as true ones. We adhere to this view and the line which our cases have drawn between false communications which are protected and those which are not. *Id.* at 741-732.

"Actual malice" thus means "serious doubts as to truth" and "a high degree of awareness of probable falsity". *Garrison vs. Louisiana, Id.* at 74. Moreover, "intent to inflict harm" does not suffice—there must be "intent to inflict harm through falsehood", *Henry vs. Collins,* 380 U. S. 356, 357 (1965). The burden of proving actual malice is on the plaintiff, *Cepeda vs. Cowles Magazines & Broadcasting Inc.,* 392 F. 2d 417 (9th Cir. 1968), *cert. denied,* 393 U. S. 840 (1968), who must make an affirmative showing of facts from which defendant's probable knowledge of falsity may be constitutionally sustained, *Thompson vs. Evening Star Newspaper Co.,* 394 F. 2d 774, 776 (D. C. Cir.), *cert. denied,* 393 U. S. 840 (1968). Further, "actual malice" may not be presumed or inferred from the nature of the defamatory statement, *New York Times vs. Sullivan, supra* at 273; *Greenbelt Coop-*

erative Publishers Ass'n vs. Bresler, 398 U. S. 6, 13 (1970); *Washington Post Co. vs. Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1101 (1967); nor from defendant's refusal to detract the allegedly defamatory statement, *New York Times vs. Sullivan, supra* at 286; *United Medical Laboratories Inc. vs. Columbia Broadcasting System Inc. supra,* at 713; *New York Times vs. Connor,* 365 F 2d 567, 577 (5th Cir. 1966).

Viewed against this standard, *there is not a whisper of evidence in this case to support a finding of actual malice.*

2. Absence of proof of falsity.

In the first place, plaintiff has fallen far short of clearing the first hurdle on the way to satisfying her standard of proof under the Constitution, i.e., proof of falsity with convincing clarity. This is an element of actual malice under the Constitutional decisions *which was totally overlooked by the trial court,* but without which liability cannot be imposed. *Garrison, supra* at 74; *Rosenblatt, supra* at 84. Not one shred of evidence was offered that the caption was false, except Mrs. Firestone's own conclusionary statement to that effect. (A. 169), and her incredible testimony that Geisler did not work for her. (A. 206-210).

That must be measured against the fact that the plaintiff alleged in her complaint that:

> defendant well knew that the employee [Geisler] whom defendant states Mary Alice Firestone got "to sell out and work for her" was a private investigator whose testimony and investigations were an integral part of this pending Divorce action. That defendant knew that said employee [Geisler] was to become, and in fact did become, a witness in that Divorce action. (A. 4).

Indeed, in paragraphs 7, 8 and 9 of her amended complaint, the plaintiff refers to Geisler no less than six times as her

"employee". (A. 4, 5). Then when she filed an affidavit in opposition to defendant's motion for summary judgment, plaintiff testified only:

> That your dependent never stated to Mr. Chandler or anyone else that she was instrumental in having Geisler switch allegiance to her from Jack Harwood.

Of course, Geisler was present in the photographs taken by Rapoport which were further evidence of his involvement with the plaintiff.

Plaintiff not only denied Geisler's employment and his presence at the interviews, but also, apparently on the theory it would make her version more plausible, she denied the presence of Rapoport and the taking of photographs of her. But those plans were laid without knowledge that the photographs were still in existence, of which even her counsel was not aware. (A. 194).

Plaintiff also claimed that there was only one interview with Chandler and the only other person present was her brother, Charles Turner.[13] (A. 172-176, 189-192). At one point, according to Mrs. Firestone's testimony, her brother left the room long enough for Chandler to proposition her and threaten her with an unfavorable story in Life because she refused.[14] (A. 174, 175). Even though he allegedly propositioned her, according to her version later the same day Mary Alice Firestone and her brother went to Farish's office, where they met Chandler by prearrangement (A. 175, 176).

However, that testimony is completely belied by that of David Chandler, Patricia Chandler and Charles Rapo-

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[13]Turner never verified this, although he testified on behalf of his sister in rebuttal on another matter.

[14]Chandler denied this preposterous claim (T.T. 880-82). He had not brought his wife of less than a year (T.T. 782) along on a business trip so that he could proposition Mrs. Firestone. The trial court evidently agreed that such a claim was incredible for there is no mention of it in his opinion.

port, and by a total of 142 photographs which were introduced into evidence. (Exs. 2A-G, 3A-G, 4A-B, E-F). Even the district court did not believe plaintiff's testimony for when the photographs were ordered into evidence, the court stated:

> I will overrule it and receive the pictures. They are of no great consequence in my opinion, in this case. *It is pretty well agreed that they took some pictures with her consent* and they were done to—theoretically—to build up a case against eavesdropping and that type of thing—(A.682) (emphasis added).

Again, following Chandler's testimony concerning his findings during his investigation which led him to believe that Geisler had sold out and gone to work for the plaintiff, the Court stated:

> Anyway, the question—we only have one question in this case; what was the connotation of your statement on that article as to whether or not—what is a sellout, in other words. All right, go ahead, and I am very happy in this case that there is enough frankness to—*there is no dispute of what was done.* (A. 802). (Emphasis added).

Defendant also conclusively established[15] Geisler's affiliation with the plaintiff and her attorney. A witness

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[15]It should not have been necessary for defendant to introduce this evidence at all. Under *New York Times,* the burden should be on the plaintiff to prove falsity with convincing clarity, a burden which clearly was not carried. The district court's ruling that the Constitution did not apply forced defendant to present an affirmative defense of truth. Given the inherent unreliability of the kind of people defendant was forced to call (that, after all, was the whole point of the Life caption), this task was rather difficult particularly because most of its questions to necessarily hostile witness were blocked either as leading or as an endeavor to impeach. Nevertheless, some significant evidence of the truth of the caption was adduced.

subpoena for Linda Firestone, Russell's previous wife, was issued by Joseph Farish, Mrs. Firestone's lawyer, and served on June 17, 1966 by C. Geisler. (A. 517-520, 840-843).

Chandler's notes, his dispatch and his testimony all indicated that Geisler and Mrs. Firestone had told him of an incident which had occurred on New Year's Eve, 1965, when Geisler and Mrs. Firestone's brother apprehended a private detective named Balletti in Mrs. Firestone's garage, while he was in the process of changing the batteries in some eavesdropping equipment.

Defendant's counsel interviewed Balletti and his partner, Perry, on the morning of August 19, 1970, and they both confirmed that the incident had occurred substantially as it had been told to Chandler. They also confirmed that the man who appears in one of Rapoport's photographs with Mrs. Firestone is Carl Geisler. Following a conference with Farish, Mrs. Firestone's attorney, Balletti on the afternoon of that same day decided to invoke the Fifth Amendment with regard to his activities and observations of that evening, although he admitted his prior conference with defendant's counsel and his subsequent change of mind. He had also had a marked change of mind about his positive identification of Geisler in the photograph, although he admitted that "it looks like him" and that he had positively identified him as Geisler a few hours earlier. (A. 457, 458).

Perry testified that, following Balletti's arrest, he went to the police station where he saw Geisler and Mrs. Firestone engaging in conversation. (A. 440-443). Perry also stated that the man in Rapoport's photograph appeared to be Geisler. Perry's recollection, however, also seemed to have diminished since that morning. (A. 444-446).

Harwood, in addition to the testimony given in his deposition confirming his statements to Chandler, testified

at trial that Geisler had in fact worked for him (A. 469, 470), that he had subsequently seen Geisler in Mrs. Firestone's company on two occasions and that he suspected that Geisler had become friendly to Mrs. Firestone's side of the litigation. (A. 470, 471, 478). He was quite vague on the subject of his statements to Chandler and the trial court refused to allow use of his deposition testimony to refresh his recollection (A. 474, 483).[16] As a result of that ruling and the trial court's rigid view of what constituted a leading question, (A. 470, 471, 481, 483, 534, 535), Harwood's hostility was difficult to overcome. At one point, however, he finally admitted having testified at his deposition that he told Chandler that it was his opinion that Geisler had sold out to the other side in the divorce case and that that testimony was correct. (A. 486).

And, in final argument, the district court disbelieved plaintiff's testimony and agreed that Geisler had switched sides:

> Mr Frates: Carl Geisler worked for Russell Firestone.
>
> The Court: I have no doubt about that.
>
> Mr. Frates: Yes, sir. And then he worked for Mary Alice Firestone.
>
> The Court: I have no doubt that he worked in her behalf after he—finished working for Russell.

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[16]Incredibly, when Harwood sought to change his testimony the district court ruled that he couldn't be refreshed or confronted with his prior inconsistent testimony in his deposition.

> The Court: I have not seen any hostility. He certainly has not shown any. The fact that he does not say the same thing does not mean that he is hostile. Apparently he is not hostile. At least, I have not ascertained it to be. (A. 483). [See also A. 543].

> . . . That was a weakness in her case, that I thought she was hesitant about admitting a circumstance which seemed to be undeniable . . .[17]
> . . . I did not believe her story that she didn't know this man was there—was true. (A. 898, 893).

Somehow, the district court found actual malice based on reckless disregard of the truth without ever making any finding as to what the truth was. However, it is clear from the evidence that Geisler had switched allegiances from Harwood to the plaintiff, that Harwood told Chandler Geisler had sold out, that Geisler worked for the plaintiff in her marital litigation, that he was present during Chandler's interviews and that the plaintiff was repeatedly photographed during the interviews. There was a rational basis of truth for the dispatch submitted by Chandler and a rational basis of truth for the publication. On this basis alone defendant is entitled to dismissal of this case under *New York Times*.[18]

3. *Absence of proof of knowledge of falsity or serious doubts as to truth.*

Beyond the question of actual truth or falsity, there was *no* evidence offered to show knowledge of falsity or serious doubts as to truth. The editorial process, which is the focal point of the constitutional issue, is extremely simple in this case and compels the conclusion that actual malice was absent. Like any editor of a major publication, Billings received a dispatch from his reporter in the field and wrote material for publication in reliance on the facts contained in the dispatch. When the caption was written, he gave the text to a researcher, who, after checking the caption against the dispatch, telephoned Chandler, read the

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[17]In fact, the plaintiff was not "hesitant"—she flatly denied the "undeniable". (A.207, 208).

[18]By the same token, truth was proved as a separate complete defense.

caption and obtained Chandler's assurance that it was accurate. It is difficult indeed to see where knowledge of falsity or serious doubts as to truth could be involved in this sequence.

Certainly Billings believed that the caption was true. The only evidence which could possibly show actual malice on his part would be that the facts he included in the caption were proved false or probably false by the material which he had before him. That is clearly not the case here, for the caption is fully supported by the information contained in Chandler's dispatch. As Billings testified, there were two portions of the dispatch which specifically referred to Geisler's switch of allegiance and each of those fully supported the statement in the caption. First, there was the statement that:

> HARWOOD HAS BEEN SHADOWING MARY ALICE SINCE JUST BEFORE FEBRUARY, 1964. SINCE THAT TIME, HE HAS DEVELOPED A PARANOIAC HATRED OF HER. HE CALLS HER A NYMPHOMANIAC PIG. SHE HATES HIM, TOO, BUT IS LESS DESCRIPTIVE ABOUT IT. *SHE WOOED ONE OF HARWOOD'S TOP INVESTIGATORS, CARL GEISLER, TO WORK IN HER INTEREST,* GEISLER AND MARY ALICE'S BROTHER, CHARLES TURNER, COMBINED AS HER AND HER 3-YEAR-OLD CHILD, MARK, BODYGUARD. (A. 73). (Emphasis added).

Second, following the narrative of Mrs. Firestone's story of Harwood's raid on her house, the dispatch continued:

> (HARWOOD VERIFIES THIS STORY AND SAYS IT IS THIS OCCASION THAT HE FIRST KNEW *CARL GEISLER HAD SOLD HIM OUT TO MARY ALICE.*)

HIS STORY: "I HAD LEFT GEISLER TO WATCH THE HOUSE. IT WAS RUSSELL'S HOUSE AND WE HAD PERMISSION TO ENTER. GEISLER RADIOS ME THAT MARY ALICE AND SOME GUY HAD GONE INTO THE HOUSE AND IT'S TIME TO MAKE THE BUST. WE GET TO THE HOUSE AND GEISLER POINTS OUT THE ROOM HE SAYS MARY ALICE AND THE GUY ARE DRINKING IN. WE BUST IN THE DOOR. THERE'S MARY ALICE ALONG WITH THE BABY AND NURSE. WE LOOK THROUGH THE HOUSE. NOBODY. WE BUST RIGHT BACK OUT.
(A. 76, 77) (Emphasis added).

Finally, Billings relied on the numerous indications throughout the dispatch that Geisler was currently working on Mrs. Firestone's side of the case, and had been for some time, including particularly the incident on New Year's Eve of 1965, related by Geisler, when he and Charles Turner apprehended Balletti in the Firestone garage.

This showing made by defendant of its editorial process should have been the end of the case. As the trial court correctly found (para. 16), Billings was the person in the Life organization who was "responsible for publication", *New York Times, supra,* at 287,[19] and it was thus *only his knowledge or doubts* which are pertinent to the constitutional inquiry. The court also found, again correctly, that Billings based the caption on the information contained in Chandler's dispatch. It is undisputed that Patureau checked the caption against the dispatch, found it to be accurate, telephoned Chandler, and obtained confirmation from him. It was thus a misrepresentation of the facts to say that the

[19]Thus Chandler confirmed that he did not "publish". (A. 825).

caption was not "verified", even though Chandler was the only source. He was, after all, an eyewitness to all the material which he included in his dispatch. Where a statement was not verified, he said so (A. 79), or made it clear to whom the statement was attributed. (A. 71, 76).

The trial court apparently would not have been satisfied with the editorial process unless Billings and Patureau had personally traveled to Florida and repeated all the interviews. As Harold Allen testified, an editor cannot "verify" in the sense of retracing his reporter's steps, and must rely on his reporter's veracity. (A. 551, 560). And that is precisely what the Supreme Court validated in *Associated Press* v. *Walker,* 388 U. S. 130 (1967) in which the Associated Press editor was held to be entitled to rely on a dispatch from its reporter in the field by the name of Savell. (p. 141).

In addition to the specific use of the words *"sold out"* and *"to work"* in Chandler's dispatch, the facts and interviews reported in that dispatch support the conclusion that that was exactly what Geisler had done. It was recently held by the Supreme Court in the case of *Time, Inc. v. Pape,* 401 U. S. 279, 91 S. Ct. 633 (February 24, 1971), that actual malice in a libel case cannot be grounded on the deliberate adoption by the publisher of one of a number of rational interpretations of a document. Here, even if the conclusion that Geisler *"sold out and work[ed]"* is not the only one which can be drawn from the Chandler dispatch, it is at least a rational one.

Without finding that anything in Chandler's dispatch was false, the district court nevertheless asserts that Billings should not have relied on it because Chandler was "controversial". Whether or not a finding of actual malice may be based on evidence that the publisher relied on a reporter negligently (which cannot as a matter of law

constitute "actual malice"), that is clearly not this case. Throughout his career, as the evidence at trial showed, Chandler's reputation for accuracy has been low among those he exposed and high among his fellow journalists. To that extent only is it "controversial".[20]

Beyond the question even of Life's knowledge of falsity or serious doubts as to truth, the evidence of Chandler's investigation on the scene shows that it was thorough and complete. No criticism of it is made in the court's findings and the only possibility suggested by plaintiff's counsel at trial as something that could have been done during the investigation and was not done was for Chandler to have read the actual words of the caption (which, of course, he did not have)[21] to Mrs. Firestone and her attorney and secure their approval of those words. (A. 815). Proof of failure to do this does not even begin to make a negligence case, and it is clear that negligence falls far short of "actual malice". *New York Times, supra* at 288; *Garrison,*

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[20]Plaintiff sought to show Chandler had a bad reputation as a journalist. However, her only witnesses were six public officials or former public officials who had been either directly or indirectly criticized by Chandler for involvement in gambling or organized crime. Five of those very willing, cooperative and available witnesses were from New Orleans, Louisiana, a forum notorious for its treatment of this defendant and personnel working for it; however, their testimony dealt only with matters subsequent to this publication. (A. 140, 162, 352-395, 397-432). As to one of those witnesses, an injunction against harassing Chandler by subpoena was affirmed by this Court because of that individual's "acknowledged hostility" towards Chandler. *Chandler vs. Garrison* 286 F. Supp. 191 (E.D. La. 1968) aff'd 412 F.2d 857 (1969). Another of those five was a plaintiff in a suit against Life. As to the sixth witness, a Florida state attorney, a series of articles on gambling in his jurisdiction was subsequently awarded a Pulitzer Prize. (A. 549, 550, 553-556). More important, from the evidence it was clear that among his fellow journalists and former employers Chandler had an impeccable reputation for honesty and good reporting. (A. 551, 552, 607, 609, 632-635, 646-650).

[21]Although they were later read to him by Patureau for his approval.

supra at 79; *Hill, supra* at 389; *St. Amant, supra* at 731-32. Chandler has testified concerning the abundance of evidence on which he based his conclusion that plaintiff persuaded Geisler to sell out. It is clear that he could not have had actual malice even if that were pertinent to our inquiry.

The other factors relied on by the district court in its finding of actual malice were totally irrelevant to such a determination. The district court discounted Billings' testimony "because he was making money on doing this". (A. 257). Profit has been explicity ruled irrelevant to First Amendment cases by the Supreme Court in *New York Times vs. Sullivan, supra* at 266 and *Time, Inc. vs. Hill, supra* at 397. The district court further relied on a finding that plaintiff did not consent to the publication of an unfavorable article about her (para. 13), and upon Life's refusal to retract the publication (para. 14), although these elements have been held to be immaterial to the question of actual malice. *New York Times vs. Sullivan, supra* at 286; *United Medical Laboratories, supra* at 713; *New York Times vs. Connor, supra* at 577; *Hurley vs. Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967) aff'd 398 F. 2d 346 (8th Cir. 1968). There is thus nothing left of the trial court's "evidence" of actual malice and defendant's motions to dismiss at the end of plaintiff's case (A. 20, 21, 436) and at the end of the entire case (A. 852, 853, 942-947) should have been granted.

Given the incontrovertible showing of defendant's good faith, and given the failure of plaintiff even to prove falsity with "convincing clarity", the judgment below cannot stand under the decisions of this and other courts.[22]

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[22]By the same token, there can be no recovery for the claimed invasion of privacy, since it must be measured by the same test as for defamation. *Time, Inc. vs. Hill, supra.* However, that point is now moot since the district court, under common law principles, found for the defendant on that claim.

APPENDIX C

In this case *de novo* review is important for a number of reasons. First of all is the constitutional perspective which will completely demonstrate the total lack of any proof of actual malice. This is especially important here where the case was tried non-jury and the district judge refused to apply the law or try the issues raised by the pleadings and this Court's prior opinion. *De novo* review is also important because of the undocumented charge by plaintiff that defendant has stated "falsehoods" in its brief. As the record will conclusively establish, defendant's brief—as documented by its numerous references to the appendix—is a completely accurate recounting of the evidence in this case. Indeed, the failure of plaintiff to attempt to document any such "falsehood" alone should demonstrate the lack of merit of that contention.

Indeed, as the record demonstrates, it is plaintiff who has made repeated misstatements of the evidence in her brief. For example, plaintiff states in her briefs (p.28) that there was no evidence "to tie Carl Geisler to appellee except the testimony of David Chandler" and (p. 29) that her "denial of employment of Carl Geisler stood uncontradicted". Such contentions cannot stand in view of the record in this case. Plaintiff herself in the amended complaint labels Geisler as her "employee" no less than six times. (A. 4, 5). In addition Chandler, his wife and Rapoport all positively identified Geisler's presence and employment. (A. 661, 678, 679, 684, 685, 699-702, 759, 760, 764, 769, 776, 780-782, 821). Harwood testified that Geisler had "sold out" to the plaintiff and that he had subsequently seen him with her on two occasions. (A. 471).[2]

[2]In her brief (p. 7) plaintiff contends that Harwood's *only* source of information was two anonymous phone calls citing pages 472 and 487 of the appendix. No such statement appears at either reference. And, in actuality, Harwood testified that Geisler's actions, particularly an abortive raid, first made him suspicious (R. 478). Then of course he received the phone calls and subsequently he personally observed Geisler with the plaintiff.

Two other private detectives also identified Geisler in photographs with the plaintiff. (A. 440-443, 457, 458). Finally, defendant proved Geisler's activities on plaintiff's behalf during the divorce litigation. (A. 517-520, 840-843). Even the district court finally concluded that Geisler had switched sides to the plaintiff: "That was a weakness in her case, that I thought she was hesitant about admitting a circumstance which seemed to be undeniable." (A. 892). Thus, contrary to plaintiff's representation, Geisler was directly proved to be her employee.

Plaintiff also (p. 10) makes the bold statement, without any record references, that she proved the article meant inciting to commit perjury. There is no evidence in this record to support that conclusion and the district court certainly did not so find. Indeed, the district court came to the exact opposite conclusion. (A. 897, 899, 907).

Likewise, she states (p. 13), again without a single record reference, that the evidence established that "she had severe difficulty in mustering witnesses" in her divorce litigation. This was not what she had complained about in this litigation. Her only complaint was that her employee's, Geisler, credibility had been damaged. (A. 4, 5). The trial judge in the marital litigation testified that the article did not affect that litigation (A. 587, 598) and the district court, after hearing all the evidence, observed "I don't think it interfered with the lawsuit." (A. 908).

The plaintiff's presentation of the evidence in her brief contains other unfounded conclusions. It also ignores pivotal testimony such as her incredible denial of the over 100 photographs taken of her by Rapoport. Suffice it to say that plaintiff's presentation is not accurate, as *de novo* review clearly demonstrates.

Turning then to the ultimate issue of actual malice, there is no evidence whatsoever to support a plaintiff's judgment

in this case. When plaintiff finally comes to grip with this issue, she rests her case, on the following points: (1) the alleged "proposition", (2) publication six weeks before the final hearing in the divorce action, (3) no permission by plaintiff,. (4) Chandler's allegedly "disgraceful" reputation and that he was hired after a one hour interview, (5) failure to make an independent verification and (6) that defendant "maintains a large staff of attorneys". When the case for actual malice is thus exposed, it is obvious that the judgment must fall.

The main thrust of the plaintiff's case is directed at Chandler, the stringer who gathered the information concerning plaintiff. No argument is made that Billings, the editor, or any other person connected with the publication did anything wrong nor is any argument made that anyone should have been in any way suspect of Chandler. To the contrary, the evidence shows that, as far as Billings was concerned, Chandler was highly competent.[8] Be that as it may, the important point here is that Chandler was not responsible for the publication (A. 825) and it is only the knowledge of those who are responsible for the publication that is relevant to the issue of actual malice. *New York Times vs. Sullivan, supra* at 287; *Associated Press vs. Walker,* 388 U. S. 130, 141 (1967).

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[8]Plaintiff argues that Billings hired Chandler after only a one hour interview without any investigation of his background or reputation (p. 6, 25). This is a perversion of the facts. Page 242 of the appendix, cited by plaintiff in support of its argument, actually reveals that Chandler was recommended by a Life stringer which Billings knew for as long as he had been wifth Life. Billings and another Life editor then interviewed Chandler along with five other applicants. And they determined that Chandler was "the best reporter of the bunch." Billings also testified that he had checked Chandler's references "by discussing him with his previous employers at New Orleans States-Item" and determined that he was "a man of high calibre". (A. 267). This then was a completely routine employment situation. And, this was all in 1964 (A. 264) and Chandler continued as a Life stringer through 1966 when the article in question was published and in 1970 when this case was tried below. (A. 741).

Moreover, the attack on Chandler boiled down to only plaintiff's testimony of the "proposition" and the opinions of six witnesses with open prejudice against Chandler. Not a single disinterested witness testified against him. Again the plaintiff's testimony was incredible. Even though she had been "propositioned" she continued to meet with Chandler and tell her story. Her own brother, who testified on her behalf and after Chandler had denied this claim, wasn't even asked to verify the events in which he participated which supposedly surrounded the "proposition". That claim cannot survive in view of such evidence and the district court apparently agreed since it was not mentioned in its findings. The opinions of Chandler's reputation, have already been demonstrated to be the prejudicial views of individuals who were adversely implicated in various investigations of gambling and organized crime in which Chandler had participated.[4] Their testimony was completely undermined by former employers and others who unanimously concurred in Chandler's high reputation for honesty and good reporting.

The remaining points of plaintiff's actual malice case are likewise without merit. Failure to obtain plaintiff's

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[4]On the basis of two of those prejudicial witnesses plaintiff states "Chandler had, in fact, lied in previous articles (A. 145, 362)". Page 362 is the testimony of Charles Ray Ward whose "acknowledged hostility" toward Chandler has already been reviewed by this Court. *Chandler vs. Garrison*, 412 F. 2d 857 (5th Cir. 1969). Page 145 is the testimony of Roland Capola who is a plaintiff against Time, Inc. (A. 725, Def. Ex. No. 13) and who had been implicated in an organized crime series published in Life during September 1967. However Capola didn't even know Chandler or his reputation. (A. 143). His sole knowledge of Chandler was an alleged by-line on one of those articles (A. 145) but the fact of the matter was that the article was written and by-line was by Sandy Smith. (A. 147, 721-723, 726, 727, Def. Ex. No. 12, p. 34 and 36). And just recently, in *Blanke vs. Time, Inc.*, another libel case arising from the same crime series, in which Chandler testified, a jury verdict was returned for the defendant. (A. 421).

permission or to otherwise investigate or verify before publication does not constitute actual malice. *Beckley Newspapers Corp. vs. Hanks,* 389 U. S. 81 (1967); *Hurley vs. Northwest Publications, Inc.,* 273 F. Supp. 967, 974 (D. Minn. 1967). And here of course, plaintiff voluntarily consented to be interviewed and discussed both her wire-tapping experiences and her marital litigation because "she would like a story done." (A. 757, 758). Even her attorney reviewed and approved of her interviews.

Publication before the marital litigation and the size of the defendant's legal staff or even its existence is likewise not proof of actual malice. Neither prove falsity or publication with knowledge of falsity or serious doubts as to truth.

Thus, when stripped to the bare bones, not a single one of plaintiff's arguments tends to even remotely show falsity, or knowledge of falsity or serious doubts as to truth, much less establish those requisites by the convincing clarity the Constitution requires. Indeed, the district court did not even find the article to be false which is the threshold issue in "actual malice". Since there is therefore no basis for plaintiff's judgment, defendant respectfully submits that the judgment below should be reversed with directions to enter judgment for the defendant.